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Land Battles Rise as U.S. Eyes 450,000 Miles of New Pipe

By Mike Lee and Ken Wells - Feb 4, 2013

When a power company tried to run cables over land owned by Larry Salois's mother near Cut Bank, Montana, the native American fought the \$400 million project.

He lost when the state passed a law forcing him to sell a right-of-way. Typical of U.S. property battles sparked by the quest for energy security, Tonbridge Power Inc. said it needed the most direct path for its electric line to wind farms, even though it would run across land holding a historical icon.

"They were going to put it right through the middle of a teepee ring," said his attorney, Hertha Lund of Bozeman. The cluster of stones marked a foundation for ancient settlements left behind by the Plains and other Indians. They're an irreplaceable cultural heritage to many native Americans.

With the natural gas industry estimating that 450,000 miles (724,000 kilometers) of pipelines need to be built in the next 25 years, a distance to the moon and almost back to earth, conflicts will multiply over eminent domain, or the legal power to condemn private property.

Land owners increasingly are pit against private businesses in state legislatures and courts as the U.S. confronts the new transmission lines, pipelines and compressor stations needed to reduce oil imports and produce clean energy at home. Lines between pro-green energy Democrats and pro-economic development Republicans can blur as farmers and ranchers object to being handed lease agreements and a pen, with little room to negotiate.

"Eminent domain is an emotional issue," says Lund, whose client eventually settled. "Up here, it's caused a real crossover in politics."

Transmission Corridors

A 2011 study conducted for the National Renewable Energy Laboratory estimates that 17,000 to 22,000 miles of new transmission lines, plus the corridors to accommodate them, would be required for the eastern half of the U.S. alone if the nation were to provide 20 percent of its electricity with wind power by 2030.

In the oil and gas industry, much more land will be needed as pipelines are built to connect growing production from shale fields to refineries and markets. Just one facet of the network -- long-haul gas pipelines -- may grow by 23 percent by 2035, according to a report from the Interstate Natural Gas Association of America.

That much pipeline may require thousands of square miles for easements and right of way. The exact amount is unclear, since builders will follow existing routes and re-use old pipelines as much as possible, Don Santa, the trade group's president, said in an interview.

Respecting Landowners

"There's a recognition on the part of the pipelines that it's in our best interest to respect the landowners, have good relations with them," Santa said in an interview.

In Salois' case, he asserted that the power line's owner, Montana Alberta Tie Line LTD., didn't have the right of eminent domain because it wasn't a public utility. The company, whose owner Tonbridge was later acquired by Canada's Enbridge Inc. (ENB), said it needed to build the 130-mile line, known as MATL, to connect Montana wind farms to the electric grid.

After a Montana court sided with Salois, the state Legislature passed a 2011 law saying merchant power companies such as MATL had the same right to condemn land as other utilities in the state. The law was backdated to cover electric lines permitted in 2008, including MATL.

95 Percent Negotiated

Typically, pipeline companies negotiate 95 percent of right-of-way agreements, Santa said. About 5 percent require some type of court proceeding, in which the company invokes its eminent domain power and asks a court to set a fair price for the land it needs.

Because eminent domain laws vary from state to state, no central clearing house tracks the number of eminent domain cases.

Private companies have had eminent domain power since at least the 1800s. Most state and federal law allows private property to be taken for "common carriers," meaning projects that serve the public by carrying power or providing transportation for all customers.

The U.S. Federal Energy Regulatory Commission holds hearings to determine the routes for interstate gas pipelines. Most other eminent domain disputes, including disputed interstate oil and liquids pipelines, are handled in local courts under state law.

Shifting Power

States have tried to shift the balance of power in landowners' favor after the 2005 U.S. Supreme Court decision known as *Kelo v. the City of New London*. The court decided 5-4 that the Connecticut city had a right to seize private property for a hotel, condos and offices.

More than 40 states have enacted laws limiting or prohibiting property seizures for economic development since the *Kelo* decision. The states have been slower to act on the issue of using eminent domain for energy projects on private property. Since 2011, at least 13 states have drafted some form of legislation dealing with the subject, often taking different approaches, according to research from the Denver-based National Conference of State Legislatures.

While Montana was granting MATL eminent domain rights, Wyoming, after a landowner backlash, put wind companies' rights to seize property on hold. Oklahoma in 2011 outlawed eminent domain in developing wind farms on private property.

The Montana senate is scheduled to hold a hearing this week on a bill that would end eminent domain for private power lines like MATL.

Merchant power line projects aren't "beneficial to the public good of Montana," state senator Debby Barrett, a Republican who sponsored the bill, said in an interview.

New Hampshire

In March, then-Governor John Lynch signed a New Hampshire law that prohibits private power-line operators from using eminent domain, in response to Northeast Utilities (NU)' plan to build the 180-mile Northern Pass power project connecting a Canadian hydro-power project to the New England electric grid. Northeast Utilities plans to build the line without using eminent domain, Chief Operating Officer Leon Olivier said on a conference call in May.

Pennsylvania, which holds a good portion of the Marcellus Shale gas field, has determined that private pipelines, including the gathering lines that take shale gas from fields to larger transmission lines, can't employ eminent domain unless they're open to all customers, Patrick Henderson, an aide to Governor Tom Corbett, said in an e-mail.

North Dakota, home of the Bakken Shale formation, allows gathering pipelines to be considered common carriers, although it's unclear how many have tried to register that way, says Pat Fahn, director of compliance for the state's Public Service Commission.

Good Faith

In Texas, the biggest oil-and-gas producing state, legislators in 2011 required pipeline companies and other private entities to make a good faith offer before condemning private property, and provide landowners with copies of appraisals used to determine the value of the offer.

Lund and other lawyers say they're seeing more eminent domain cases in court.

"It's increased at a level I've never seen in the past 10 years," says Justin Hodge, a Houston attorney who specializes in eminent domain cases there.

Farmers and ranchers in the Mountain West, who often oversee miles of pipelines on their property, have tried negotiating as groups to gain better terms from pipeline companies, Frank Falen, an attorney in Cheyenne, Wyoming, said. It's more productive than trying to block the pipelines, since states usually give pipelines clear authority to take private land.

"Because of the way the condemnation laws are in Wyoming we knew the odds of keeping the pipeline from coming were very, very small," said Pat Wade, a Wyoming rancher who worked with Falen on the right-of-way for OneOk Inc. (OKE)'s Bakken Natural Gas Liquids pipeline.

Direct Challenge

Landowners have had little luck with direct challenges to eminent domain laws.

In 2011, the Texas Supreme Court ruled that Denbury Green Pipeline, a Plano, Texas company, had overstepped the law when it used eminent domain to acquire a right-of-way for a carbon dioxide pipeline across the land of Texas Rice Land Partners in Beaumont.

The farm's owners argued that the pipeline, though it crossed from Texas to Louisiana and received permits from Texas regulators, wasn't a common carrier because only Denbury would be served by it. The court ruled that Denbury needed to do more to prove it was a common carrier -- including proving it was carrying carbon dioxide for third parties -- and sent the case back to a lower court for more review.

Keystone XL

Subsequently, Julia Trigg Crawford, a Paris, Texas farmer, argued that the Denbury ruling prevented TransCanada Corp. (TRP)'s disputed Keystone XL oil pipeline from seizing a 50-foot right-of-way on her property. A judge determined that Keystone meets the Texas common carrier definition. Crawford is appealing that verdict.

Michael Bishop, a 64-year-old retired chemist, is also suing TransCanada in state court to keep Keystone off his 20-acre farm near the small town of Douglass, Texas. He contends he granted the

company an original easement under duress and that TransCanada misrepresented the pipeline as a crude oil project when it primarily will transport liquefied Canadian bitumen, a form of thick crude oil, to Texas refineries.

The company denies his claims. A judge decided in January that Bishop's bid to rescind the Keystone easement contract belonged in a different court and dismissed his case. Bishop vows to continue the litigation.

"I've told those Keystone people from the beginning, 'I don't like your bully tactics. I just want you to leave my homestead alone,'" Bishop said.

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